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Nos. 87-1303 & 87-1310

In The

Supreme Court of the United States

October Term, 1987

ALLEGHENY PITTSBURGH COAL COMPANY,
Petitioner,

V.

COUNTY COMMISSION OF WEBSTER COUNTY, WEST VIRGINIA,
Respondent.

EAST KENTUCKY ENERGY CORPORATION
ONEIDA COAL COMPANY, INC., and
SHAMROCK COAL COMPANY, INC.,
Petitioners,

V.

COUNTY COMMISSION OF WEBSTER COUNTY,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Appeals of West Virginia

BRIEF AMICUS CURIAE OF THE NATIONAL TAXPAYERS UNION IN SUPPORT OF PETITIONERS

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BRIEF AMICUS CURIAE OF THE NATIONAL TAXPAYERS UNION IN SUPPORT OF PETITIONERS

Having obtained the written consent of the parties pursuant to Rule 36.2 of this Court, the National Taxpayers Union respectfully submits the following brief as amicus curiae supporting the petitioners in urging this Court to reverse the judgment of the West Virginia Supreme Court of Appeals. Copies of the consent letters have been filed with the Clerk.

INTEREST OF THE AMICUS CURIAE

Achieving relief from discriminatory taxation, a central issue in this litigation, is one of the key goals of the National Taxpayers Union. The American political system relies heavily on the democratic process to control increases in government revenues. Discriminatory taxation provides opportunistic politicians with the chance to disassociate benefits from burdens, so that some people can enjoy the benefits while others bear the burdens. The National Taxpayers Union opposes inequitable taxation as an institutional arrangement that interferes with the democratic process and that is skewed to encourage government expansion.

The National Taxpayers Union has actively supported taxpayer efforts to control tax rates. The amicus has thus become intimately familiar with the frustration at rising tax liabilities that gave rise to tax limitation measures in various states, best known of which is California's Proposition 13. Calif. Const. Art. XIIIA (Appendix, infra). Proposition 13 features an assessment method similar to that challenged here. The National Taxpayers Union offers its views concerning the way that a decision by this Court defending tax uniformity may be reconciled with tax limitation measures.

Because the National Taxpayers Union's members have frequently challenged improper or illegal taxation, the amicus has a unique understanding of the difficult hurdles encountered by taxpayers in litigation. If the Court were to depart from its repeatedly reaffirmed precedent regarding the appropriate remedy for discriminatory taxation, taxpayer litigation could be seriously hampered.

The National Taxpayers Union was founded as a citizens' lobby by concerned taxpayers in 1969. It is a

nonprofit, nonpartisan membership organization devoted to protecting the interests of federal, state and local taxpayers through public education, lobbying and litigation on tax and spending issues. With members in all 50 states, the National Taxpayers Union represents over 150,000 taxpayers.

SUMMARY OF ARGUMENT

In this case, the Court addresses a property tax assessment method that systematically discriminates against newcomers and in favor of long-term landowners. Known as the "welcome stranger" method, the valuation approach essentially reassesses property only when it changes hands. As land values appreciate over time, the appraisal discrepancy between new and existing owners becomes more pronounced. In the current case, some newly reassessed tracts are valued for tax purposes 65 times higher than comparable properties.

The "welcome stranger" method is an unconstitutionally discriminatory vehicle for allocating tax liability, even when the divergence is not extreme. The defect in the reassessment on sale approach is that it consistently biases political decisionmaking. When some taxpayers bear a heavier portion of the community's tax burden than others, the benefited taxpayers have an incentive to support higher tax rates and greater governmental expenditures. They do not bear their full proportional burden; they can free ride at others' expense.

The analysis presented in the following brief establishes that uniformity is consistent with the goal of property tax limitation. The amicus urges this Court to reinvigorate its long-standing precedent preventing unconstitutional discrimination in allocating the burden of

taxation. The National Taxpayers Union believes that tax limitation need not be sacrificed in an effort to achieve uniformity. Accordingly, the National Taxpayers Union analyzes how the key features of these tax limitation measures can be retained while furthering uniformity.

The amicus urges the Court to adhere to the remedy of restoring equality of assessments by reducing the taxes of the complaining taxpayer. If taxpayers challenging inequitable taxes or assessments cannot obtain tangible judicial relief through a tax reduction, then there is no incentive and no mechanism to vindicate tax uniformity.

ARGUMENT

I. Uniformity Of Taxation Is An Essential Requirement Of Equal Protection, And An Assessment Method Must Produce Reasonable Uniformity

Taxation is the "means of distributing the burden of the cost of government." *Carmichael v. Southern Coal Co.*, 301 U.S. 495, 508 (1936). The States, in the exercise of their taxing power, are subject to the requirements of the Equal Protection Clause of the Fourteenth Amendment. *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 526 (1959); *Lehnhausen v. Lake Shore Auto Parts*, 410 U.S. 356, 359 (1973). Thus the burden of taxation should be distributed according to principles of equality and uniformity. The concept of uniformity in taxation is so crucial that at least 45 state constitutions and the United States Constitution contain some form of tax uniformity clause. Moran, Is Everyone Paying Their Fair Share? An Analysis of Taxpayers' Actions to Equalize Taxes, 85 W. Va. L. Rev. 209, 212 (1983); U.S. Const. art. 1, sec. 8, cl. 1 (relating to duties, imposts, and excises).

The Fourteenth Amendment, however, does not require an "iron rule of equal taxation," *Bell's Gap R.R. v. Pennsylvania*, 134 U.S. 232, 237 (1890). Because of the difficulty of adjusting taxation so as to achieve exact equality, *LaBelle Iron Works v. United States*, 256 U.S. 377, 392 (1921), there is no constitutional need to maintain "precise, scientific uniformity." Allied Stores at 527.

The mere fact that a one-sentence rule can be enunciated defining the circumstances under which property valuations will be increased does not mean that constitutional uniformity has been achieved. It is not enough for the county assessor to claim that he "assessed all real estate that was subject to a recent transfer based upon fifty percent of the value contained in the declaration of consideration of value in the deed, without exception." Brief in Opposition to the Petition for a Writ of Certiorari at 2-3.

Contrary to the county's assertion, a discriminatory rule does not gain validity because it is applied without exception. Consistent application of some rules would certainly offend equal protection. For example, "A rule that says that all Jews must wear a yellow star has the same generality and clarity as one that says that all Jews are entitled to exemption from military service on the Sabbath. But there the similarity ends." Epstein, Beyond the Rule of Law: Civic Virtue and Constitutional Structure, 56 Geo. Wash. L. Rev. 149 (1987). Likewise, consistent application of a rule that benefits long-term landowners at the expense of newcomers cannot be upheld.

To fully analyze the uniformity question, we must consider the following factors:

(1) Whether newcomers and long-term landowners are sufficiently separate classes, so that the Webster County assessor may treat them differently without violating constitutional constraints.

(2) If so, whether this classification rests "upon some ground of difference having a fair and substantial relation to the object of the taxation." *Allied Stores*, 358 U.S. at 527; *Louisville Gas & Electric Co. v. Coleman*, 277 U.S. 32, 37 (1928).

A. The "Welcome Stranger" Assessment Method Discriminates Between Taxpayers Who Are Arguably Within The Same Classification

The first step of this analysis is based on the concept that statutes should "bear equally on all who fall into the same class." *Atlantic and Pacific Tea Co. v. Grosjean*, 301 U.S. 412, 424 (1937). But see *Carmichael v. Southern Coal Co.*, 301 U.S. at 509. Whatever ability a legislature or electorate might have to select the "welcome stranger" rule as a deliberate policy, the Court need not offer the same deference to a single errant public official. A "failure to assess all property taxed ad valorem at the same proportion of its value" is a denial of equal protection. *Louis K. Liggett Co. v. Lee,* 288 U.S. 517, 539 (1933); *Cumberland Coal Co. v. Board of Revision*, 284 U.S. 23 (1931).

The West Virginia assessor's actions appear to fail the scrutiny under the first factor. State statutes do not specify such a distinction. The West Virginia Legislature has attempted to overcome inequities in assessments by requiring that a statewide re-appraisal be completed, and updated annually. Moran, supra, at 116, citing W. Va. Code sec. 18-9A-11 (1977). The state tax commissioner has issued guidance that would lead to more current valuations of property, but statewide guidance was ignored by the Webster County assessor. East Kentucky Energy Corp., et al., Petition for Certiorari, Appendix A at

34a-35a. The assessor's actions appear to have created a vast difference between landowners who were within the same class under state law.

While arguing that the challenged tax assessment amounts to an unauthorized discrimination between taxpayers who, under state law, should have been treated identically, can we simultaneously argue that this constitutes the "systematic and intentional" discrimination prohibited by the 14th Amendment? The question is clearly answered in the affirmative by *Iowa-Des Moines National Bank v. Bennett,* 284 U.S. 239 (1931). The facts in *Iowa-Des Moines* were very close to the West Virginia case in that the taxpayer-petitioner's tax was properly computed, but other taxpayers were undertaxed, and the tax collector's actions were not entirely consistent with state law. The court found that the unauthorized actions of a single errant tax collector can still amount to intentional and systematic discrimination in violation of equal protection.

Likewise, in *Liggett*, the Court held: "[W]here a statute lays a tax upon property ad valorem at an even and equal rate, discrimination may result from the fact that the assessing officials systematically and intentionally value some property subject to the tax at a proportion of its true value different from that fixed with respect to other like property." 288 U.S. at 539-40. Intentional and systematic discrimination may be distinguished from accidental and sporadic discrimination. The obvious rationale for the distinction is to avoid having isolated arithmetic or factual errors rise to the level of constitutional violations. The petitioners' suit is based upon the effect of a "rule" regarding reassessment of property, applied across the board. The discrimination is undoubtedly systematic.

There is only one problem with this analysis of whether the county assessor wrongly discriminated

bewteen those who were in the same class under state law and thus entitled to expect the same treatment. The problem is that the West Virginia Supreme Court of Appeals concluded to the contrary, i.e., both that the assessor's actions met the minimum requirements of state law and that the county assessor's actions did not constitute intentional and systematic discrimination. East Kentucky Energy Corp., et al., Petition for Certiorari, Appendix A, at 8a. The court's rationale is not clear, but it appears that the court meant that there was no discrimination as a matter of law, and could never be any discrimination so long as the taxpayer's property was not assessed above its market value.

Thus despite its seeming insufficiency, the county assessor's reassessment on sale technique cannot be discarded as a mere failure to properly observe state law classifications. Accordingly, we now turn to the second factor identified above, whether the classification itself is proper.

B. Classifications Created By The "Welcome Stranger" Assessment Method Are Not Reasonably Related To The Objects Of Taxation

A classification for tax purposes must not be arbitrary or capricious. The distinction must be based "upon a state of facts that reasonably can be conceived to constitute a distinction or difference in state policy." *Allied Stores* 358 U.S. at 530; *Kahn v. Shevin*, 416 U.S. 351 (1974). It must be based on some difference in the state's relation to the transaction, not just to the owner's residence. 358 U.S. at 530. The Court will strike down a tax if it is "unable to discover any reasonable basis" for a tax classification. *Liggett*, 288 U.S. at 539.

The recent case of *Hooper v. Bernalillo County Assessor*, 105 S. Ct. 2862 (1985), raised the same kinds of newcomer v. old-timer conflict addressed herein. The Court in *Hooper* found that a distinction between veterans moving to New Mexico before 1976 and those moving there after that time was not rationally related to a tax exemption's asserted purpose. "This case involves a distinction between residents based on when they first established residency in the State." 105 S. Ct. 2866 n.6. The Court examined whether the residency classification bore a rational relationship to the legislative objectives, and concluded that it did not. The Court emphasized the impropriety of favoring long-time citizens. "The State may not favor established residents over new residents based on the view that the State may take care of 'its own,' if such is defined by prior residence. Newcomers, by establishing bona fide residence in the State, become the State's 'own' and may not be discriminated against solely on the basis of their [later] arrival . . ." *Id.* at 2869.

The *Hooper* decision relied heavily on *Zobel v. Williams*, 457 U.S. 55 (1982), which likewise concerned new residents who had been disadvantaged relative to longer term residents. As the *Hooper* opinion noted, "*Zobel* made clear that the Constitution will not tolerate a state benefit program that 'creates fixed, permanent distinctions . . . between . . . classes of condededly bona fide residents, based on how long they have been in the State." *Hooper,* 105 S. Ct. at 2869, quoting 547 U.S. at 59.

The only grounds for distinguishing these cases from the instant controversy is that the prior cases discriminated between people based on the date of residency, while West Virginia has selected the date of property acquisition. The dangers of political favoritism remain the same. Such transparent favoritism cannot serve as a legitimate state interest.

The West Virginia tax currently challenged was to provide general government services. Differentiating between new and existing landowners does not serve any apparent function in furthering the purposes of the tax. There is no nexus between the length of time a property has been owned by the taxpayer and the appropriate distribution of the burden of supporting government. Furthermore, the county has not asserted that newcomers place any greater burden on government services than long-time residents. Even if this were an asserted purpose, a permanently continuing tax differential based on the length of property ownership would not serve this purpose. See *Hooper*, 105 S. Ct. at 2868.

Because neither the West Virginia Legislature nor Supreme court have identified the state interests underlying the "welcome stranger" approach, it may be helpful to consider the rationale enunciated for the reassessment on sale valuation method in the context of California's Proposition 13. Calif. Const. Art. XIIIA (Appendix, *infra*).

The California Supreme Court upheld Proposition 13 against an equal protection challenge in *Amador Valley Joint Union High School District v. State Board of Equalization*, 149 Cal. Rptr. 293, 583 P.2d 1281 (1978). The court said the reassessment on sale approach "finds reasonable support in a theory that the annual taxes which a property owner must pay should bear some rational relationship to the original cost of the property, rather than relate to an unforeseen, perhaps unduly inflated, current value." 583 P.2d at 1293. Property owners, the court said, can estimate their future tax liability under Proposition 13 with some assurance. A subsequent purchaser is assessed at a rate that reflects "the price he is willing and able to pay for that property." *Id.* The

acquisition value is based on "the owner's free and voluntary acts of purchase." *Id.*

Do these identified purposes constitute legitimate state interests? Significantly, the statement of purposes does not relate to the "object of the taxation." *Allied Stores*, 358 U.S. at 527. There is no attempt to consider whether taxpayers are assessed differently to address any special burden (e.g., if new residents generated additional expenses for counties) or benefit (such as expenditures that would particularly benefit new landowners). Nor is there any attempt to identify characteristics (such as wealth, age, or corporate v. individual status) distinguishing new owners from old.

The California court's analysis instead rests on vague expectations about predictable rates of taxation. While sudden increases in tax bills are a concern shared by the National Taxpayers Union, they are not a justification for forcing some people to bear a disproportionately large share of the costs of government. The concern is more appropriately addressed by limiting taxes for all citizens.

C. The "Welcome Stranger" Assessment Method Creates Undesirable Political And Economic Incentives

The situation created by the "welcome stranger" approach is attractive to local politicians. Despite statutory and state constitutional directives requiring uniform assessments, tax assessors have frequently diverged from assessing property at the current market value. See, e.g., Moran, *supra* at 214-17. The Supreme Court pondered this enigma in an early case: "[I]f we look for the reason for this common consent to substitute a custom for the positive rule of the statute, it will probably be found in the difficulty of subjecting . . . property . . . to

the inspection of the assessor and the grasp of the collector." *Cummings v. Merchant's National Bank,* 101 U.S. 153, 163 (1879).

Another reason for the recurring incidence of "welcome stranger" assessments is the political benefit. It permits officials to acheive wealth transfers "with relative invisibility and thus relative immunity from normal democratic processes." *Pennell v. San Jose,* 56 U.S.L.W. 4168, 4173 (1988) (J. Scalia, concurring in part and dissenting in part). The current owners, who are favorably treated, are currently within the taxing authority and able to participate in the democratic processes that control allocation of the tax burden. The group who suffers discrimination are likely to be excluded from political participation in the local taxing authority when the rule is established. In short, reassessing only new purchases pleases the voters at the expense of non-voters (or at least a minority of voters).

Recent cases regarding discrimination against interstate commerce, such as *Metropolitan Life Insurance Company v. Ward,* 470 U.S. 869 (1985), are not directly relevant here because the class of new property purchasers is not facially limited to out-of-state residents. *CTS Corporation v. Dynamics Corporation of America,* 107 S. Ct. 1637, 1649 (1987). The rationale is nevertheless very similar. Discrimination against non-residents is dangerous because the non-resident is excluded from the political process and thus cannot defend his interests.

Economic analysis also challenges the reasonable basis for an assessment method that excessively burdens transfers of title. Such a method malapportions taxes across properties of like value and results in substantial losses. Transfers of property are discouraged because increased taxation serves to increase the selling price. Buyers must essentially pay a higher price for property,

and so they will be less willing to buy. Many socially beneficial sales will not take place. Ultimately, the system could lead to economic stagnation.

The National Taxpayers Union wishes to conclude this discussion by reaffirming the importance of the tax limitations contained in Proposition 13, and particularly the two percent ceiling on increases in assessments. The original purposes of the proposition would continue to be served, even if its discriminatory provisions were severed. See Calif. Const. Art. XIIIA, sec. 6 (Appendix, *infra*). Obviously, the severability of California's Proposition 13 is not before the Court at this time. But the major impact of this Court's decision may not be felt in West Virginia, where the legislature has already mandated that new assessments bring all property valuations up to date. The decision may potentially impact billions of dollars worth of property subject to the "welcome stranger" form of assessment. For this reason, the National Taxpayers Union has extrapolated beyond the current issues to examine whether a Supreme Court decision upholding uniformity will necessarily frustrate citizen attempts to limit taxation.

We conclude that holding the "welcome stranger" assessment method unconstitutional would further the goals of reasonable and equitable taxation. The problem of excessive increases in property taxation can be controlled without resorting to discriminatory taxation.

Ii. Reducing An Assessment To An Amount Equal To Average Assessments Remains The Appropriate Remedy For An Equal Protection Violation

This Court has, for many years, consistently ordered the same remedy to vindicate unconstitutionally

discriminatory assessments. The proper remedy is to lower the individual taxpayer's tax until it is in line with everyone else's. The taxpayer does not need to adjust everyone else's taxes upward to remedy discriminatory taxation.

"The right invoked is that to equal treatment; and such treatment will be attained if either their competitors' taxes are increased or their own reduced. But it is well-settled that a taxpayer who has been subjected to discriminatory taxation through the favoring of others in violation of federal law cannot be required himself to assume the burden of seeking an increase of the taxes which the others should have paid. . . . Nor may he be remitted to the necessity of awaiting such action by the state officials upon their own initiative. . . . The petitioners are entitled to obtain in these suits refund of the excess of taxes exacted from them." *Iowa-Des Moines National Bank,* 284 U.S. at 247.

The West Virginia Supreme Court failed to recognize this long-standing precedent. The Petition for Certiorari of East Kentucky Energy Corp., et al., at 25, points out that other state courts have likewise disregarded the constitutionally required remedy. The Supreme Court should not waver from adhering to a remedy that is firmly grounded in legal theory and fairness, and creates a beneficial incentive structure.

A taxpayer's rights to non-discriminatory taxation are adequately vindicated if everyone else's taxes are raised to his level of taxation. *Hillsborough v. Cromwell,* 326 U.S. 620, 623 (1920). But the state cannot constitutionally restrict the remedy to contesting others' tax assessments and forcing them to be raised. *Iowa-Des Moines National Bank,* 284 U.S. at 247.

Webster County asserts that the Court diverged from its precedent in *Louis K. Liggett Co. v. Lee,* 288 U.S. 517 (1933). This view is mistaken. *Liggett* acknowledged the

general remedy rule. 288 U.S. at 539-40. It found the rule inapplicable where (1) the allegation is that some people are paying no taxes because of official oversight, and (2) state law provides a mandamus action to force collection. In such a case, plaintiffs cannot avoid paying taxes. The remedy is clearly supported by *Ligget,* but is limited to situations of "unequal and discriminatory *assessment*". Id. at 540 (emphasis added). That is exactly the situation the Court faces here.

The remedy of forcing the individual taxpayer to seek increases in everyone else's taxes presents the danger of courts taking over the running of taxing authorities to assure diligence in compliance. In West Virginia, if a taxpayer successfully pursued a mandamus remedy, the courts would have to oversee multi-year backlogs of unassessed property in order to provide a meaningful remedy. On a nationwide basis, the courts would face staggering administrative problems in determining whether a sufficient level of equality had been achieved. Lowering the individual litigant's tax gives the agency an incentive to mend its ways or face many more taxpayer suits, but does not involve judicial supervision.

If taxpayers must proceed by challenging their neighbors' disproportionately low assessments in individual proceedings, the enormous uncompensated financial burdens would form a barrier against challenging inequitable taxation. See Moran, *supra.* If the taxpayer has no hope for reducing his own taxes, then inequitable taxation would almost always remain unchallenged.

CONCLUSION

For the foregoing reasons, The National Taxpayers Union urges this Court to reverse the decision of the West Virgina Supreme Court of Appeals.

Respectfully submitted,

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APPENDIX

California Constitution Article XIIIA

(Proposition 13)

Section 2. Full cash value; reassessment; newly constructed property; seismic safety; value of replacement dwelling; full cash value base; change in ownership; family transfers

(a) The full cash value means the county assessor's valuation of real property as shown on the 1975-76 tax bill under "full cash value" or, thereafter, the appraised value of real property when purchased, newly constructed, or a change in ownership has occurred after the 1975 assessment. All real property not already assessed up to the 1975-76 full cash value may be reassessed to reflect that valuation.

* * * *

(b) The full cash value base may reflect from year to year the inflationary rate not to exceed 2 percent for any given year or reduction as shown in the consumer price index or comparable data for the area under taxing jurisdiction, or may be reduced to reflect substantial damage, destruction or other factors causing a decline in value.

* * * *

Section 6: Severability

If any section, part, clause, or phrase hereof is for any reason held to be invalid or unconstitutional, the remaining sections shall not be affected but will remain in full force and effect.